(2)

No. 98-1299

IN THE

SUPREME COURT OF THE UNITED STATES

NEW YORK STATE – PETITIONER

VS.

MICHAEL HILL – RESPONDENT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Respondent asks of leave to file the attached response brief to the State's petition for writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

[*] Respondent has previously been granted leave to proceed *in forma pauperis* in the following courts:

Monroe County Court, Monroe County, State of New York; Supreme Court, Appellate Division, Fourth Department, State of New York; New York Court of Appeals.

Respondent's affidavit or declaration in support of this motion is attached hereto.

Edward John Nowak

Edward John Nowak, Esq.
Monroe County Public Defender

20 pp.

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Michael Hill, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$	$	$ 18:00	$ =
Self-employment	$ Gym worker	$ I AIN'T GOT NOE	$ =	$ =
Income from real property (such as rental income)	$ NONE	$ NONE	$ NONE	$ =
Interest and dividends	$ NONE	$ NONE	$ =	$ =
Gifts	$ NONE	$ NONE	$ =	$ =
Alimony	$ NONE	$ NONE	$ =	$ =
Child Support	$ NONE	$ NONE	$ =	$ =
Retirement (such as social security, pensions, annuities, insurance)	$ NONE	$ NONE	$ =	$ =
Disability (such as social security, insurance payments)	$ NONE	$ NONE	$ =	$ =
Unemployment payments	$ NONE	$ NONE	$ =	$ =
Public-assistance (such as welfare)	$ NONE	$ NONE	$ =	$ =
Other (specify):	$ NONE	$ NONE	$ =	$ =
Total monthly income:	$ 18:00	$	$ =	$ =

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
PRISON	LORAIN CORR INST 2075 S. NOV Belden RD GRAFTON, OHIO 44044	1-7-95	$ 18:00
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
I AIN'T GOT	NO WOMAN		$
			$
			$

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
0	0	$ 0	$ 0
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value NONE

☐ Other real estate
Value NONE

☐ Motor Vehicle #1
Year, make & model NONE
Value

☐ Motor Vehicle #2
Year, make & model NONE
Value

☐ Other assets
Description I AIN'T GOT NO FORM OF ASSETS
Value

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
NONE	$ NONE	$ NONE
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
my Family	Turn Their	back on me

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
	I spend my entire pay on	
Rent or home-mortgage payment (include lot rented for mobile home)	$	$ Commissary
Are real estate taxes included? ☐ yes ☒ no		
Is property insurance included? ☐ yes ☒ no		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ NO	$ NO
Home maintenance (repairs and upkeep)	$ NO	$ NO
Food	$ 18.00	$ 0
Clothing	$ NO	$ NO
Laundry and dry-cleaning	$ 8 A MONTH	$
Medical and dental expenses	$ 3 A MONTH	$

Transportation (not including motor vehicle payments)	$ NO	$ =
Recreation, entertainment, newspapers, magazines, etc.	$ NO	$ =
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ NO	$ =
Life	$ NO	$ =
Health	$ NO	$ =
Motor Vehicle	$ NO	$ =
Other:	$ NO	$ =
Taxes (not deducted from wages or included in mortgage payments) (specify):	$ NO	$ =
Installment payments		
Motor Vehicle	$ NO	$ =
Credit card(s)	$ NO	$ =
Department store(s)	$ NO	$ =
Other:	$ NO	$ =
Alimony, maintenance, and support paid to others	$ NO	$ =
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ NO	$ =
Other (specify):	$ NO	$ =
Total monthly expenses:	$ NO	$ =

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ yes ☑ no If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ yes ☑ no

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid – or will you be paying – anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ yes ☑ no

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

AT THIS POINT IN TIME I'm CURRENTLY INCARCERATED IN A STATE PRISON IN OHIO, AND I ONLY MAKE $18 dollors A MONTH. AND I HAVE TO buy food AND hygienes OUT OF THAT. I AIN'T GOT NO OTHER SOURCE OF INCOME COMING IN.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: MARCH 29, 1999

michael hill

(Signature)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

– No. 98-1299

THE STATE OF NEW YORK,
Petitioner,

v.

MICHAEL HILL,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Michael Hill, through his counsel, Edward John Nowak, Esq., Monroe County Public Defender, Rochester, New York, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the New York Court of Appeals in this case. That opinion is reported at 92 N.Y.2d 406 (1998).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES

MISCELLANEOUS

REASONS WHY THE WRIT SHOULD BE DENIED

1. *The case at bar was decided by the New York Court of Appeals in a manner consistent with the uniform holdings of the federal circuit courts and those state courts that have reached the issue of waiver under the Interstate Agreement on Detainers (IAD).*

As set forth in detail in part (2) below, the New York Court of Appeals held that Mr. Hill's attorney did not waive Mr. Hill's IAD rights by responding, "[t]hat will be fine, Your Honor," to a court-proposed trial date outside of the IAD's prescribed time-period as counsel's response was but an acquiescence to the proposal and not an "express agreement," as that term is used in the context of IAD waivers. While the specific facts that give rise to the issue at bar are very unusual and not likely to often arise, made evident herein is the consistency with which the courts, both federal and state, interpret and apply the waiver provisions of the IAD. In fact, with the sole exception of the State of Indiana, all of the forty-eight states[1] and the District of Columbia which are signatories to the IAD, and all of the eleven federal circuits, have used the same standard for determining the issue of when a defendant has waived his IAD rights. Significantly, the precedents established by the federal circuit (and state) courts make easy the application of the law, as evidenced by the New York Court of Appeals's ready - and correct - application of the existing law to the unique facts presented by Mr. Hill's case.

Specifically, the federal courts of appeal have required that in order for a

---

[1] Louisiana and Mississippi are not signatories to the Interstate Agreement on Detainers, a federal compact governed by federal law (see, Cuyler v. Adams, 449 U.S. 433 (1981)), which is codified in New York as Criminal Procedure Law § 580.20.

defendant to waive his rights under the IAD, (s)he must do so explicitly or by an act expressly or impliedly inconsistent with the provisions of the IAD. This test, while sometimes worded slightly differently (see, e.g, p. 7 of Petitioner's brief to this Court), results in fair and consistent holdings when strictly applied. To illustrate the cohesiveness and lack of confusion in the interpretation of the IAD and waivers under the compact by the federal courts of appeal, see, e.g.: U.S. v. Rossetti, 768 F.2d 12 (1st Cir., 1985); U.S. v. Ford, 550 F.2d 732 (2nd Cir., 1977); U.S. v. Palmer, 574 F.2d 164 (3rd Cir., 1978); U.S. v. Odom, 674 F.2d 228 (4th Cir., 1982); U.S. Scallion, 548 F.2d 1168 (5th Cir., 1977); U.S. v. Eaddy, 595 F.2d 341 (6th Cir., 1979); Webb v. Keohane, 804 F.2d 413 (7th Cir., 1986); Camp v. U.S., 587 F.2d 397 (8th Cir., 1978); Snyder v. Sumner, 960 F.2d 1448 (9th Cir., 1992); Yellen v. Cooper, 828 F.2d 1471 (10th Cir., 1987); U.S. v. Johnson, 713 F.2d 633 (11th Cir., 1983).

The seminal cases of U.S. v. Eaddy, 595 F.2d 341 (6th Cir., 1979), and U.S. v. Odom, 674 F.2d 228 (4th Cir., 1982), present excellent practical examples of the correct application of the federal waiver test to two fact scenarios that ultimately required opposite judicial determinations. In Odom, id., defense counsel requested a continuance as the psychiatric evaluation of his client was not yet complete. The court held that the defense had, therefore, waived its rights under the IAD by requesting an adjournment in its bests interests and inconsistent with the legislative intent of the IAD. In Eaddy, 595 F.2d 341, however, despite defense counsel's statement that he "did not care" where his client, a state prisoner, was held pending the federal charges (where transfer of the defendant back to state custody prior to his federal trial was directly contrary to articles III(a) and (d) and IV(c) and (e) of the IAD), the court held that

counsel's failure to state a preference as to his client's place of incarceration was not a waiver of his IAD rights. Id. at 345. The court held that to hold otherwise would "shift the burden of compliance with the Agreement away from the Government, where Congress placed it, onto the prisoner." Id. at 345. See also, State v. Dolbeare, 663 A.2d 85 (N.H., 1995) (defendant did not have to demand that the prosecutor and court comply with the IAD as long as he did not affirmatively request that they follow a procedure inconsistent with it). Accordingly, as exemplified by Eaddy, id., and Odom, 674 F.2d 228, the controlling federal case law establishes that delays, unless expressly requested by the defense, are chargeable to the defense *only* where they are to the *benefit* of the defendant.

The state courts which have considered the standard for waiver under the IAD have uniformly adopted the same standard in determining waiver as have the federal courts. See, e.g.: State v. Hill, 638 So.2d 1376 (Ala. Crim. App., 1993); Conway v. State, 707 P.2d 930 (Alaska Ct. App., 1985); State v. Burrus, 151 Ariz. 581 (1986); People v. Nitz, 219 Cal. App.3d 164 (1990); People v. Brown, 854 P.2d 1332 (Colo. Ct. App., 1993); Haigler v. U.S., 531 A.2d 1236 (D.C. Cir., 1987); State v. Edwards, 509 So.2d 1161 (Fla. Dist. Ct. App.,1987); Moon v. State, 258 Ga. 748 (1988); State v. Schmidt, 84 Hawai'i 191 (1997); People v. Laws, 200 Ill. App.3d 232 (1990); Kansas v. Maggard, 16 Kan. App.2d 743 (1992); Roberson v. Kentucky, 913 S.W.2d 310 (Ky., 1994); Bunting v. Md., 80 Md. App. 444 (1989); People v. Jones, 197 Mich. App. 76 (1993); Missouri v. Moore, 882 S.W.2d 253 (Mo. Ct. App., 1994); State v. Seadin, 181 Mont. 294 (1979); Snyder v. Nevada, 103 Nev. 275 (1987); State v. Dolbeare, 663 A.2d 85 (N.H., 1995); State v. Montoya, 119 N.M. 95 (1995); People v. Hill, 92 N.Y.2d 406

(1998); State v. Clarkson, 87 Or. App. 342 (1987); Commonwealth v. Thornhill, 411 Pa. Super. 382 (1992); State v. McKinley,148 Wisc.2d 952 (1989). Every other state that is a signatory to the IAD has addressed the compact in one context or another but have not had cause to reach the question of waiver presented herein.[2] The paucity of IAD cases in those states (and those which have addressed waiver) both underscores the cohesiveness in the acceptance by the states of federal precedent in IAD cases and the infrequency in which the issue of waiver in an IAD context arises.

Likewise, Mr. Hill's case is also entirely in accord with the federal circuit courts and those state courts which have reached the issue of waiver under the IAD. Indeed, it is only the State of Indiana that imposes, *sua sponte*, an objection requirement upon the defense (see, e.g., State v. Greenwood, 665 N.E.2d 579), a requirement that is in direct contravention of federal (and state) precedent. In Odom, 674 F.2d 228, for instance, the court specifically addressed the objection requirement as the defendant had requested a continuance based upon the Federal Speedy Trial Act (STA). The court held that an objection based on the IAD was necessary only where a defendant

[2] See, e.g, Finley v. State, 295 Ark. 357 (1988); State v. Braswell, 194 Conn. 297 (1984); State v. Davis, WL138993 (Del. Super., 1993); Sherman v. Idaho, 107 Idaho 869 (1984); Hickey v. Iowa, 349 N.W.2d 772 (Iowa Ct. App., 1984); State v. Watson, 657 A.2d 776 (Me., 1995); Commonwealth v. Fasano, 6 Ma. App. Ct. 325 (1978); State v. Fuller, 560 N.W.2d 97 (Minn. App., 1997); State v. Harper, 2 Neb. App. 220 (1978); State v. Miller, 277 N.J. Super. 122 (1994); State v. Dorsett, 344 S.E.2d 342 (N.C. Ct. App., 1986); State v. Moe, 581 N.W. 2d 468 (N.D., 1998); State v. Holt, 83 Ohio. App.3d 676 (1992); Gallimore v. State, 944 P.2d 939 (Okla. Crim. App., 1997); State v. Moosey, 504 A2d 1001 (R.I., 1986); State v. Holbrook, 260 S.E.2d 181 (S.C., 1979); State v. Goodroad, 521 N.W.2d 433 (S.D., 1994); State v. Hall, 976 S.W.2d 121 (Tenn., 1998); Schin v. Texas, 744 S.W.2d 370 (Tex. Crim. App., 1988); Buchanan v. Utah, 663 P.2d 70 (Utah, 1983); Godfrey v. Roessel, 136 Vt. 324 (1978); Valentine v. Commonwealth, 18 Va. App. 344 (1994); State v. Hott, 173 W.Va. 502 (1984); Knox v. State, 848 P.2d 1354 (Wyo., 1993).

asserts that compliance with the STA infringes upon his rights under the IAD in order that the court can be able to determine and record whether the "good cause" requirement for a continuance under the IAD was also satisfied. Id. at 231-232. Notably, the court in Odom, id., did not require the defense to register a contemporaneous objection and found the issue preserved where counsel first moved for dismissal pursuant to the IAD months after the continuance at issue was granted. The IAD places no affirmative obligation on the defendant to alert the court of his IAD rights; to preserve for appeal a violation of the IAD, a defendant need only raise the issue prior to or during trial. Brown v. Wolff, 706 F.2d 902, 907 (9th Cir., 1983); Eaddy, 595 F.2d at 346. Thus, it is Indiana that is aberrational, and the holding of the New York Court of Appeals in Mr. Hill's case that is directly in accord with all of the federal circuits and those state courts that have reached the waiver issue. Consequently, Respondent respectfully submits that the case at bar is not worthy of the granting of certiorari. See, Taylor v. U.S., 493 U.S. 906 (1989) (denial of certiorari correct where petition fails to identify any inter-Circuit conflict concerning the question presented).

2. *The decision below fails to raise the Question Presented in the petition.*

The sole Question Presented in Petitioner's brief (p. 1) is whether "a defendant's express agreement to a trial date beyond the 180-day period required by the Interstate Agreement on Detainers constitute[d] a waiver of his right to trial within such period?"

In this case, Petitioner misconstrues the question addressed by the New York Court of Appeals as that court did not decide whether a defendant's *express agreement* to a trial date beyond the time-frame mandated by the IAD constituted a waiver of defendant's IAD rights (as set forth above, that issue has been addressed without

conflict by the federal circuit courts). Moreover, the facts of record do not support a determination of the question presented by Petitioner to this Court.

Rather, as described by the New York Court of Appeals, Mr. Hill's attorney's act of acquiescing to the court's (and prosecutor's) proposed trial date did not constitute a waiver of Mr. Hill rights under the IAD. As the phrase "express agreement" is used in the context of IAD waivers, acquiescence or concurrence is not the same. Thus, the New York Court of Appeals rejected the argument presented again here by Petitioner and premised its holding on the finding that the words of Mr. Hill's counsel were not an express agreement but, instead, something considerably less, i.e., only a concurrence or acquiescence.[3]

As repeatedly stated in the opinion of the New York Court of Appeals, defense counsel simply concurred in the proposed trial date and that "mere concurrence in the suggested date does not constitute an affirmative request." See, Hill, 92 N.Y.2d at 410-412. The court below held that the mere acquiescence - or concurrence - in a court-proposed trial date is insufficient to waive a defendant's IAD rights for to hold otherwise would shift the burden of compliance with the Agreement away from the Government, where Congress placed it, onto the prisoner. See, e.g., Odom, 672 F.2d 1471; Eaddy, 595 F.2d at 345. And upon review of long-standing federal and state precedent (see part (1), above), nor does acquiescence or tacit concurrence equate with an express

[3] Moreover, at a time of increased concern of the lack of civility in the courtroom, a finding that counsel's respectful acquiescence to a court-proposed trial date constitutes a waiver of the substantive statutory rights of a client would have a chilling impact on the willingness of counsel to comport themselves in a polite manner. See, e.g., Standards Of Civility - A Lesson In Good Manners, 45 JAN FEDRLAW 2 (1998); Professionalism Starts On Local Level, 67 MAR JKSBA 16 (1998).

agreement under the IAD where no benefit accrues to the defendant. Only one case found by Respondent involved like facts - and was decided accordingly. See, People v. Allen, 744 P.2d 73 (Colo., 1987) (defense counsel's response of "fine" to court-proposed trial date deemed acquiescence and not a waiver of defendant's IAD rights as to rule otherwise would impermissibly shift the burden of compliance to the defendant).

Thus, the Question Presented by Petitioner was not the question addressed by the court below and is not presented by the case at bar. While the case at bar presented a rare fact pattern, the applicable law is clearly set forth by federal precedent and, as followed by the New York Court of Appeals in Mr. Hill's case, illustrates the straightforward disposition readily achieved by strict adherence to federal (and state) precedent.

3. *Conclusion.*

In summary, Petitioner's brief neither raises a question presented by the holding of the court below nor presents this Court with a question worthy of the granting of a writ of certiorari. The case at bar raised a question for which the controlling federal law (and existing state law) is consistently interpreted in uniform fashion. Indeed, the clarity of the existing law is underscored by the direct - and correct - application of the controlling law to the facts by the court below. Moreover, issues of waiver in IAD cases are rare and the facts in the case at bar so unique that the decision in the case at bar turned on its own facts and calls for no additional voice by this Court that would help illuminate an issue of nationwide significance or affect even a small number of other litigants.

CONCLUSION

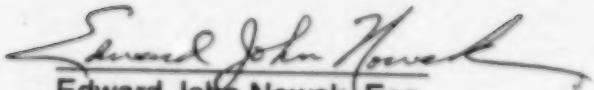
For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Edward John Nowak, Esq.
Monroe County Public Defender
10 N. Fitzhugh Street
Rochester, New York 14614
(716) 428-5210

Stephen John Bird, Esq.
Assistant Public Defender
10 N. Fitzhugh Street
Rochester, New York 14614
(716) 428-5416

Counsel for Respondent:



Edward John Nowak, Esq.
Monroe County Public Defender